(13)

No. 03-9659

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The State's brief is written as if this case—and this very same record—had not been the subject of a studied opinion by this Court just last year. The State ignores equally this Court's detailed modeling of the proper method for analyzing each part of the present record under the legal rules of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and the Fifth Circuit's many deviations from that model. Purporting to defend the correctness of the trial court's decision, the State fails even to acknowledge the many errors this Court already identified in that court's handling of the case.

Instead, the State proceeds as if it is enough to show that each individual aspect of the prosecution's conduct, viewed in isolation, can conceivably be explained on race-neutral grounds. In many instances, the State fails to do even that. But the more fundamental flaw in the State's approach is to lose sight of the requirement, emphasized by this Court, that the habeas court consider the cumulative weight of *all* the evidence of racial discrimination.

Here, the weight of that evidence is simply overwhelming. The statistical patterns alone, as this Court recognized, are stark: 91% of eligible African-Americans, but only 13% of whites, were peremptorily struck by the prosecution. The import of those lopsided numbers becomes even more clear when one considers the Dallas County D.A.'s Office's decades-long policy of openly inculcating its attorneys to eliminate minority members from juries. And the prosecutors in petitioner's case learned those lessons well. It is difficult to imagine anything but a racially discriminatory motive behind their efforts to use so-called jury shuffles to keep African-Americans from being considered for petitioner's jury. Nor can one discern anything but a racially discriminatory purpose for the contrived strategies of questioning that the prosecutors used to target African-American members of petitioner's venire, searching for trumped-up grounds to knock them out of consideration. Finally, there is the fact, also already recognized by this Court, that the excuses offered by the prosecution for its strikes against African-

Americans apply equally well to a number of white jurors whom the prosecution was happy to retain. Nearly as telling as the juror comparisons themselves are the contrivances the State must adopt to claim that the record does not support the similarities between struck African-Americans and retained whites noted by this Court. Considering this wealth of evidence, the prosecutors' peremptory strikes of 10 of the 11 qualified African-Americans in petitioner's venire simply cannot reasonably be believed to have been untainted by racial prejudice.

ARGUMENT

1. ***An entrenched practice of deliberate racial exclusion.*** This Court concluded that the abundant evidence of a longstanding practice of race discrimination in jury selection by the D.A.'s Office, up through the time of petitioner's trial, showed that "the culture of the . . . office was suffused with bias against African-Americans in jury selection." JA 41.[1] This Court emphasized that this evidence was clearly relevant to the ultimate determination whether to credit the prosecutors' purported race-neutral reasons for their racially disproportionate peremptory strikes. *Id.*

The State now resorts to obfuscation and misstatement in an effort to avoid the implications of this evidence for any fair assessment of the prosecutors' actions.[2] According to the State (Br. 6), "[t]he historical evidence . . . does not implicate the prosecutors involved in Miller-El's trial." But in fact the record shows that the prosecutors *in petitioner's*

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[1] Moreover, this Court found that African-Americans in Dallas County "almost categorically were excluded from jury service." *Id.*

[2] Unable to respond to the substance of this powerful contextual evidence, the State attempts to avert the Court's eyes from it on procedural grounds. While those efforts themselves reflect the weakness of the State's position, they are also unfounded. For example, contrary to the State's assertion (*see* Br. 42 n.34), the *Dallas Morning News* articles providing detailed statistical studies of race discrimination in jury selection by the D.A.'s Office *were* in evidence at the *Batson* hearing (JA 895, 1018-1051). *See also infra* n.3.

case had been trained during the long period when the D.A.'s Office explicitly taught its lawyers to use race in selecting juries. Pet. Br. 15-17. The record also shows that the prosecutors *in petitioner's case* had been caught using the same racially discriminatory tactics at virtually the same time as petitioner's trial, and as a result death sentences in those cases were set aside under *Batson*. *Id.*[3]

When these very prosecutors in this case used peremptory strikes in a statistically highly disparate way, questioned jurors in a highly disparate way, used jury shuffles that can only be understood as intended to change the racial composition of the relevant portion of the venire, and accepted white jurors with strengths and potential liabilities remarkably similar to those of black jurors they struck, it strains credulity—indeed it defies reasonable belief—to argue that race played no role in their peremptory challenges.

The State also misleadingly suggests (Br. 40-41) that the Fifth Circuit took account of the historical evidence and weighed it in conjunction with all the other evidence in reaching its conclusion that race did not play a significant role in any of the prosecution's peremptory strikes. But the State's position cannot be squared with the plain language of the Fifth Circuit's opinion. The court of appeals discounted

[3] The State contends (Br. 41-42) that the evidence connecting these prosecutors to the Office's long history of systematically excluding African Americans from juries was not properly before the state courts. Wholly apart from the offensiveness of arguing that there is no evidence of discriminatory conduct by these prosecutors in the face of reported judicial decisions, the State's contention is wrong. The fact that the D.A.'s Office's manuals advocated the discriminatory tactics used here was indeed before the trial court. JA 807-812. And the decisions finding *Batson* violations by petitioner's prosecutors in nearly contemporaneous cases had been handed down *before* the state appellate court considered petitioner's *Batson* claim. As a matter of precedent and judicial notice, then, those findings were before the state courts when the final *Batson* determination in petitioner's case was made. They are thus part of the "evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), properly considered when deciding whether the state courts' determination was unreasonable.

the significance of the pattern and practice evidence with the legally irrelevant explanation that petitioner had "already met the burden under the first step of *Batson*." *Compare* JA 8 *with* JA 41. And rather than weighing that evidence together with the rest of petitioner's evidence, the court assessed it in isolation. The state court's finding of no discrimination must be presumed correct, the Fifth Circuit explained, "*and accordingly* the general historical evidence does not *prove* by clear and convincing evidence that the state court's finding ... was incorrect." *Id.* (emphases added). Only if the court of appeals considered the pattern and practice evidence in isolation would it require that evidence alone to confront the deference normally owed the state court's findings and to prove the state court incorrect on its own.

Because a "culture ... suffused with bias against African-Americans in jury selection" (JA 41) is the context for the actions of these prosecutors and this case, the rationalizations of neither the court of appeals nor the state trial court can stand.[4] When such prosecutors from such an office exclude virtually all African-Americans from a capital jury in the statistically and quantifiably biased fashion manifest here, no reasonable court can blink away the compelling inference of discrimination by looking at the culture of bias with only one eye and looking at the mathematics showing bias only with the other.

2. ***The jury shuffles.*** This Court concluded that the prosecution's misuses of the jury shuffle process "raise a suspicion that the State sought to exclude African-Americans from the jury" and "tend[] to erode the credibility of the prosecution's assertion that race was not a moti-

[4] As this Court observed, the state courts' failure even to "mention ... the historical record of purposeful discrimination" in evaluating petitioner's claim, and the trial court's indefensible conclusion "that there was not even the inference of discrimination to support a prima facie case," weighed heavily against the validity of their ultimate determination of a lack of purposeful discrimination. JA 42.

vating factor in the jury selection." JA 40. As with the historical evidence, the prosecution's obvious effort to eliminate African-Americans from consideration through the jury shuffle process is powerful evidence of its desire for and willingness to pursue removal of African-Americans from the jury on the basis of their race. In response, respondent recycles one argument already rejected by this Court and proposes another so far-fetched that it has never before even been mentioned in the State's five previous briefs in the Fifth Circuit and this Court.

Disputing the Court's firm conclusion that "[o]n yet another occasion the prosecutors . . . lodged a formal objection [to a defense shuffle] only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward" (JA 29), the State repeats, nearly verbatim, its briefing from *Miller-El I* that the prosecution's informal, pre-shuffle objection rules out the inference of racially discriminatory motive. *Compare* Resp. Br. 37-38 *with* Resp. Br. in *Miller-El I* 21-22. But the State's delay in registering a formal objection until after seeing that the shuffle brought African-American jurors to the front of the seating arrangement actually *supports* that inference. Moreover, the State omits to mention that the trial judge roundly criticized the substance of the prosecution's objection—making inescapable the inference that race, and not a real concern with the mechanics of the shuffle, motivated the prosecution's behavior. JA 131 (trial judge stating that "I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to do it in the manner in which it was done in this case").

The State next cites a recent Texas Court of Criminal Appeals decision in a case in which the prosecution justified its shuffle of a seating arrangement by demonstrating that the front group contained relatively few individuals wearing coats and ties, relatively many individuals with criminal histories, and at least one probation officer that the prosecutor recognized and didn't want to offend by striking. Resp. Br. 36-37 (citing *Ladd* v. *State*, 3 S.W.3d 547, 563-564 (Tex. Crim

App. 1999)). But the record in *this* case does not support any such non-race-based explanations. It demonstrates only that the front groups at issue contained a predominance of African-American jurors. *See* JA 124-129, 530. This speculative "coat-and-tie" argument—never before raised by the State—is frivolous and typifies the State's unending grasping at straws for additional post-hoc justifications for the prosecutors' conduct here. Indeed, petitioner's trial attorney twice directly accused the State of shuffling the jury to exclude African-Americans and the State twice refused to explain its behavior. JA 129, 530. As this Court explained, if evidence of a race-neutral explanation had existed, "it cannot be assumed that the State would have refrained from introducing it." JA 39-40 (internal citations and quotation marks omitted).

Even more revealing than the State's strained efforts to deny the prosecutors' plainly racial motivation in the jury shuffle process are the aspects of the jury shuffle evidence that the State *declines* to address or defend. *First* is "the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used th[e] [jury shuffle] process to manipulate the racial composition of the jury in the past." JA 40.[5] This fact "amplified"

[5] Rather than explaining the state court's omission, the State chides petitioner (Br. 39) for characterizing the testimony at issue as an "admission." The criticism is misplaced (the word is this Court's, not petitioner's) and wrong (a sitting Dallas County judge testified that, in his courtroom, Dallas County prosecutors had "volunteered the information that they requested a shuffle" to exclude African-Americans from jury service: plainly an "admission"). JA 858-859. Not even the State is prepared to argue that the testifying judge (himself a former Dallas County prosecutor) or the prosecutors in question had any reason to misrepresent the truth. Instead, the State offers the strained, one-sentence contention (Br. 39) that prosecutors' actions in one trial "ha[ve] little bearing" on the prosecutors' actions in petitioner's trial. This Court, however, obviously rejected that view, or it would not have criticized the state court for failing to mention the testimony.

this Court's concerns about the jury shuffle evidence. JA 40.[6]

Second, the State also declines to defend the Fifth Circuit's troubling one-sentence dismissal of the jury shuffle evidence: "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." JA 8. As our opening brief explained, this statement is legally irrelevant (because petitioner's actions certainly could not excuse the State's wrongdoing), factually incorrect (because prosecutors shuffled the jury *three* times), and under-inclusive (because it fails to mention the D.A.'s Office's admission and the prosecution's two frivolous and unsuccessful attempts to undo shuffles that moved, or might have moved, African-American jurors forward in the seating arrangement). *See* Pet. Br. 19-20 & nn.4, 6.

Third, apparently recognizing the futility of denying the overwhelming evidence of racial motivation in the prosecution's use of jury shuffles, the State invites this Court to "assum[e]" that the jury shuffle evidence "supports an inference of [racially] discriminatory purpose," but then asks the Court to indulge the notion that the prosecutors would *not* have that same racially discriminatory purpose in using their peremptory challenges. Resp. Br. 6.[7] Yet in its lengthy discussion of the jury shuffle evidence (*id.* at 36-40), the State fails to offer a single reason *why* the prosecutors would abandon this discriminatory objective once the jury shuffles were completed. Nor is there any reason to believe they did.

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[6] If the State means implicitly to rely on its dubious theory that "[t]he focus of the habeas court's inquiry is the state court's ultimate decision, not its process" (Br. 6), it again misses the point of this Court's specific concerns over the state court's failure to mention the testimony JA 40, 42.

[7] At another point in its brief (Br. 36), the State accuses petitioner of "overstat[ing] the significance of the State's requests for jury shuffles"—again, hardly an outright denial of discriminatory motive. The Fifth Circuit's decision offers similarly studied ambiguity. JA 8 (concluding only that petitioner's "circumstantial" jury shuffle evidence "does not overcome" the State's explanations for its peremptory strikes).

Both jury shuffles and peremptory challenges provide a perfect opportunity for those "who are of a mind to discriminate" (*Batson*, 476 U.S. at 96 (quoting *Avery* v. *Georgia*, 345 U.S. 559 (1953))), because both affect the composition of the jury and neither involves judicial oversight or action. It defies common sense (especially in light of the Dallas County prosecutors' training, history, and culture of discrimination in use of peremptory strikes) to suppose that the prosecutors in petitioner's case were perfectly willing to use the jury shuffle process to exclude African-Americans from the jury but suddenly stopped thinking that way when it came to peremptory challenges.

3. ***Disparate questioning.*** The State also declines to defend the state court's conclusion that the prosecutors in petitioner's case did not engage in disparate questioning of veniremembers (JA 929)—maintaining instead that the disparate questioning may be explained on grounds other than race. The evidence does not support that contention.

Disparate Questioning About Views on the Death Penalty. Contrary to this Court's reading of the record when this case was last before it, the State continues to deny that the prosecutors took race into account when deciding whether to preface questions about jurors' views on the death penalty with a graphic description of an execution. JA 26-27, 39. But here are the facts: the prosecutors used the graphic description for more than half of the African-American jurors (8 out of 15), but almost *none* of the white jurors (3 out of 49). JA 39.

In its earlier brief before this Court, the State tried to explain this disparity by arguing that the prosecutors reserved the graphic script for jurors whose questionnaires expressed reservations about the death penalty and that African-American jurors were more likely to have such reservations. JA 39. In making this argument, the State identified ten African-American and ten white jurors whose questionnaires expressed reservations about the death penalty or, if their questionnaires were not available, whose subsequent voir dire testimony showed that they harbored reser-

vations about the death penalty. Resp. Br. *Miller El I* 17, 18 & nn.38-39. This Court rejected the State's argument because, even if true, this meant that of the jurors with reservations about the death penalty, "7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description." JA 39.On remand, the State asserted and the Fifth Circuit accepted a new theory—first offered in Justice Thomas's dissenting opinion—which tried to explain the prosecutors' use of the graphic script by speculating still more aggressively about the possible contents of missing juror questionnaires. Our opening brief (Br. 24-26) demonstrated that inferring the contents of juror questionnaires from subsequent voir dire testimony was inconsistent with the requirements of federal habeas review. We also demonstrated (Br. 27-29), based on the record, that if the Fifth Circuit had *properly* pursued the State's speculative methodology, it would have been forced to conclude that the prosecutors gave the graphic script to any African-American juror who expressed *any* doubts or hesitation about the death penalty, but gave it only to the white jurors who expressed the *strongest possible* opposition to the death penalty. By either of the State's methodologies, therefore, nothing but racial bias explains the disparity.

Apparently conceding the accuracy of our criticism, the State now takes the position that "arguments based on questionnaires not contained in the record are 'sheer speculation.'" Resp. Br. 29 (quoting Pet. Br. 25). But in sounding this retreat, respondent omits to mention that it was the State—not petitioner—that first invited both this Court and the Fifth Circuit on remand to infer the contents of juror questionnaires from subsequent voir dire testimony. *See* Resp. Br. *Miller-El I* 17-18 & nn. 38-39; Br. of Respondent-Appellee at 26-27, *Miller-El* v. *Cockrell*, No. 00-10784 (5th Cir. 2003). Nor does the State acknowledge that this retreat fatally undercuts the Fifth Circuit's justification for concluding that the prosecution did not consider race in using the graphic script. *See* JA 16-19.

Instead, the State now propounds yet another new approach: that the Court should consider only the jurors for whom questionnaires are available (the 12 seated jurors and the 10 jurors for whom petitioner originally raised *Batson* challenges). But this new approach hardly redeems the gross racial disparity.

First, the experiences of this small subset are *ab initio* guaranteed *not* to explain why virtually no white jurors were given the graphic script. The only white jurors in the subset of veniremembers whose questionnaires are in the record are those who made it through the entire jury selection process and thus were likely to be relatively unobjectionable to either side.

Second, the State's latest approach requires it to concede (Br. 30-31) that out of 11 African-Americans for whom questionnaires are available, the seven who showed any sort of hesitation regarding the death penalty were given the graphic script. Yet, as noted in our opening brief (Br. 27) white juror Leta Girard (whose questionnaire is not available) testified during voir dire that she left blank one of the questionnaire items on the death penalty, but she did not receive the graphic script. JA 624. Four other white jurors gave questionnaire responses showing some degree of hesitation about the death penalty, yet these four *also* were not given the graphic script.[8] In other words, even in the limited sample of veniremembers whose juror questionnaire responses are known, all African-American jurors showing any hesitation received the graphic script, while several white jurors showing some hesitation did not.

Thus, the State's third attempt to concoct a race-neutral explanation for the prosecutors' conduct also fails. The fact remains that the prosecution *did* use the graphic script in a

[8] The questionnaires of three of these jurors appear in the record: JL 199 (Kevin Duke), 239 (Sandra Hearn), 176 (Marie Mazza). The fourth, Charlotte Whaley, stated in voir dire that she qualified her questionnaire answer affirming her belief in the death penalty with the phrase "[d]epending on the circumstances." JA 715.

racially discriminatory manner. Like the historical evidence of training, culture, and the conduct of these prosecutors in other cases, and the jury shuffle evidence in this case, this behavior is powerfully probative of the prosecution's general intent to exclude African-Americans from petitioner's jury. Moreover, as this Court explained, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." JA 39.

Disparate Questioning About Minimum Sentencing. The State also continues to deny (Br. 32-36) that its prosecutors questioned African-American veniremembers differently than white veniremembers about their willingness to impose the minimum sentence for murder.[9] Again, the facts are to the contrary: the prosecutors informed 94% (34 of 36) of white jurors but only 12.4% (1 of 8) of African-American jurors of the statutory minimum before quizzing them about what they could accept in the way of a minimum sentence for murder. JA 39.

This Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." JA 40. In particular, this Court noted that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." JA 40 (*citing Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)).

The Fifth Circuit's opinion and the State's present brief are both entirely silent on Assistant District Attorney Paul Macaluso's documented use of the discriminatory minimum

[9] As this Court previously pointed out (JA 27), under Texas law at the time of petitioner's trial, unwillingness to impose the minimum sentence was cause for removal. *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972).

sentencing ploy.[10] As before, the most significant implication of the State's silence is the apparent concession that there is *no* good reason to expect that a prosecutor who used the minimum sentencing ploy to exclude African-Americans based on race in one case would not have used the same ploy for the same purpose in petitioner's case. The Fifth Circuit's silence on this issue after it was highlighted by this Court is especially notable.

The State devotes the bulk of its discussion of the minimum sentencing issue to the fallacious argument that the African-American jurors subjected to the minimum sentencing ploy were more opposed to the death penalty than the white jurors not subjected to that ploy. As our opening brief explained, however, this view is both unsupported in the record and specifically contradicted by a finding of this Court. *See generally* Pet. Br. 30-32. As with so much of its brief, on this issue the State simply fails to acknowledge this Court's specific conclusions drawn on precisely the same record.

4. ***Juror comparisons.*** The State also ignores this Court's observation that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. Without attempting to reconcile either the Fifth Circuit's reasoning or its own with the precepts of this Court's *Miller-El I* decision, the State constructs its arguments with the same partial picking-over of fragmented pieces of the voir dire transcript, presented in isolation and out of context, that this Court has already rejected. *Compare, e.g.*, Resp Br. 14 *with* Resp. Br. *Miller-El I* 6-7. Indeed, the State tries to make its

[10] The State's brief does address in cursory fashion the contemporaneous judicial findings that both prosecutors in petitioner's case were found to have committed *Batson* violations in other prosecutions. Resp. Br. 41-43. But the State fails to acknowledge or discuss the fact that Macaluso was *also* found to have engaged in the minimum sentencing ploy to disqualify African-Americans from jury service, in addition to using peremptory strikes for that purpose.

case by quoting, as if it were the majority opinion, the factual conclusions of Justice Scalia's concurring opinion. Resp. Br. 18 (quoting JA 45).

A brief of this length cannot address each of the State's distortions of the voir dire record, but the fundamental error of its approach is clear. If accepted by this Court, that approach would defeat any *Batson* challenge, however meritorious.

First, according to the State, the Court must assume that prosecutors' exercises of peremptory challenges necessarily "require[] . . . [them] to assess innumerable variables and intangibles." Resp. Br. 18; *see also id.* at 1.

Second, the State picks through the voir dire of each stricken minority juror to find *any* statement or exchange that, without regard to its place in the juror's voir dire examination as a whole, might reasonably be a "variable[] and intangible[]" suggesting anything other than strong pro-prosecution feelings. *See generally* Resp. Br. 7-17. For example, the State completely ignores the fact that African-American veniremember Billy Jean Fields was a conservative, deeply religious, middle-aged family man with deep roots in the community and unflinching law-and-order and pro-death penalty views. *See* Pet. Br. 35. The State instead attempts to justify peremptorily striking him based on one snippet of voir dire—his discussion of religion and rehabilitation (Resp. Br. 11-14)—even though he added, at the very next moment, that he could impose the death penalty even on a truly rehabilitated, repentant defendant (JA 184-185).[11]

Third, when necessary to explain specific testimony in which African-American jurors whom the State struck were clearly more pro-prosecution than white jurors whom it accepted, the State reverses field. When convenient, it rejects a detailed parsing of the voir dire record in favor of characterizations of African-American prospective jurors as defendant-friendly or of white prospective jurors as prosecution-friendly on the basis of some *Gestalt* impression the prosecutors purportedly drew from the prospective juror's voir dire as a whole. Thus, although white veniremember Sandra Hearn (who was eventually seated on petitioner's jury) did not think that "anyone should be sentenced to death on [a] first offense" (JA 429), the State falls back on the claim that "throughout individual voir dire [she testified] that she believed in the death penalty" and the fact that her father was a retired FBI officer. Resp. Br. 19-20. Of course, if an African-American veniremember had been struck with just such a record—as African-American veniremember Fields was struck despite a far *stronger* pro-prosecution profile—the State would have seized on just these specific statements to justify its action.[12]

This Court should not accept the State's shifty logic. The voir dire process will always provide prosecutors (and defense attorneys) with reasons simultaneously to like and dislike all but the most extreme veniremembers (who almost certainly will be struck by one side or the other). Only those jurors who offer something for both sides to favor—and therefore for both sides to question—will be seated. Yet the State invites this Court to consider in a vacuum only whether a hypothetical, well-intentioned prosecutor might have had a single conceivable (non-racial) reason for disliking the African-American jurors who were peremptorily

[11] Fields testified that his strong religious faith actually led him *strongly to support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 173-174.

[12] The State seeks to justify its failure to strike white jurors with the specious argument that particular jurors can be cavalierly written off as a generic "good prosecution juror" if defense counsel challenged or struck that white juror. *See, e.g.*, Resp. Br 18 n.9 (unnamed jurors), 20-21 (Hearn), 24 (unnamed jurors), 25 (Vickery), 26 (Davis). But a juror may well be a "bad" juror from the perspectives of both the defense and the prosecution for different reasons—as is well-illustrated by the fact that over sixty of the 108 venire members were excused in this case by agreement of the parties. JA 899.

struck and preferring the white jurors who were not. That mode of analysis would inevitably render *Batson* a dead letter and lead habeas courts to "abandonment or abdication of judicial review." JA 35.

Instead, this Court made clear in *Miller-El I* that the proper question is whether—given the history of discrimination in jury selection by this office and these prosecutors, the racially-driven jury shuffling, the race-coding of juror cards, and the racially disparate questioning—the prosecution's racially disparate use of peremptory strikes, taken cumulatively and with each decision judged in light of the full voir dire record, can be explained on grounds other than race. In particular, the Court emphasized the importance of considering whether the alleged race-neutral reasons for which the prosecutors *claim* they struck the African-American jurors appear to apply as well to white jurors they did *not* strike. If they do—as this Court believed after considering precisely the same record and arguments now before it (JA 37)—it is simply naïve and unreasonable to indulge the notion that race was not a factor.

Consider, for example, Edwin Rand and Marie Mazza. The prosecutors asserted that they struck African-American veniremember Rand because of his ambivalence about the death penalty. JA 290. But Rand expressed no greater hesitancy than did white juror Mazza (or white juror Hearn for that matter). Indeed he expressed less. Rand wrote on his juror questionnaire that he supported the death penalty "depending on [the] crime," and that he thought it was "possibly" appropriate for "all murder." JL 30. During voir dire, he confirmed that he thought the death penalty "could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation." JA 262; *see also* JA 263-264 (death penalty should be considered for robbery-murder "because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing"). Rand made one remark early in his voir dire testimony expressing some uncertainty about his ability to impose the death penalty, and

the State simply repeats that remark over and over (*see* Resp. Br. 14-15), as though it typifies Rand's testimony.[13] In fact, however, immediately after that remark and in response to point-blank questions from the prosecutor, Rand confirmed six times that he could serve on a capital jury and vote for death. JA 266-268.[14] Rand's support for the death

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[13] The Fifth Circuit noted Rand's comment that the death penalty was a "touchy subject" (JA 11), suggesting that the remark implied unwillingness to vote for a capital sentence. But the remark is better understood as simply a sensible characterization of the state of opinion about the death penalty in our country.

[14] The exchange was as follows:

Q . . . [D]o you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes, I do.

Q Okay. Now, you hesitated a few minutes ago and— . . . That's what I was coming back to, have you given it enough thought now that you feel like you're pretty certain you could do something like that?

A Yes, I do.

Q Okay, So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did it while in course of committing or attempting to commit robbery, you will find him guilty of that, if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

A Yes, I would.

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

penalty was also clear from his affirmative response to the State's query regarding the appropriate *minimum* punishment for *non-capital* murder: "I think I could still go with the death penalty on that." JA 270. The State, like the Fifth Circuit, fails to acknowledge any of these statements from Rand's voir dire testimony.[15]

By comparison with the excluded African-American Rand, who repeatedly affirmed his willingness to vote for death, retained white juror Mazza was downright equivocal in her responses about the death penalty. Like Rand, Mazza began by saying that the appropriateness of the death penalty would turn on the facts of the case. JA 353. But she then went on to share at length her uncertainties about her ability to vote for death. First, she mentioned her religious training and beliefs: "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 353-354. Then, she stressed her worry that friends and neighbors would react critically if she voted to execute someone: "Not everyone is for capital punishment and my communication with these people, I feel like right now I'm in a very respected position and I don't want to lose any respect although I feel, you know, I am a citizen and these are my decisions. I don't want it reflected on anything else. That's kind of what I have been more concerned about, what other people think." JA 355. While, in the end, she said she thought she could vote for a capital sentence, her ultimate affirmations were less direct and less numerous than Rand's.

Q You're telling me you can do that?

A Yes.

[15] Yet the prosecutors' contemporaneous notes mention some of them and indicate the prosecutors' recognition of Rand's readiness to serve: "Could be enforced depending upon circums ... Murd./Robb. — Type of offense think proper for DP ... 'Yes' — I can serve." JL 30.

An evenhanded assessment of Rand's and Mazza's testimony, then, can lead only to the conclusion that Rand's and Mazza's views on capital punishment and on voting for a death sentence were similar, and that, if one of the two was more likely to support a death sentence, it was Rand. Nothing in the opinion below or in the many briefs the State has filed in this case suggests otherwise. Thus, the conclusion seems inescapable that it was Rand's race alone that made the difference in the prosecution's decision to strike him and leave Mazza unchallenged.[16]

* * * * *

Together, the State's techniques for analyzing a record in response to a prima facie showing of racially discriminatory use of peremptories would, if countenanced, render *Batson* entirely impotent. If the general impression favors the African-American juror, a detail can be found upon which to object; if the details favor the African-American juror, it is the *Gestalt*, determined by the State, that matters. The only limit on this strategy is the creativity of the State's appellate lawyers. It is unnecessary to look further than petitioner's case to see that this is so: the respondent's brief seeks to obscure a glaringly obvious mosaic of racial discrimination by dwelling myopically on tile-by-tile argumentation. This Court should ensure, by reversing the Fifth Circuit and granting Miller-El's petition for a writ of habeas

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[16] One aspect of Rand's testimony also illustrates another way in which the State uses double standards when assessing the voir dire testimony of African-American and white veniremembers. When discussing white juror Sandra Hearn, the State discounts one basis of her hesitation about the death penalty, namely, her opposition to the death penalty for first offenders, by suggesting that it was unimportant in light of the fact that this was not petitioner's first offense. *See* Resp. Br. 19. But African-American Rand receives no similar dispensation from the State even though he made clear that, whatever factual circumstances in a murder case might lead him to conclude that it did not warrant the death penalty, he supported death for robbery-murders fitting the facts of this case. *See* JA 262-264.

corpus, that the clear pattern in the mosaic as a whole decides this and other cases.[17]

CONCLUSION

For the foregoing reasons, in addition to those set forth in our principal brief, the Court should reverse the judgment of the court of appeals and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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NOVEMBER 2004

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[17] The State of California's *amicus* brief correctly observes that respondent has waived any right to object—if indeed such grounds for objection exist—to petitioner's use of comparative juror analysis to establish a *Batson* claim. Calif. Br. 5-6 (citing JA 910); *see also id.* at 8. Thus, the Court's view on the question California raises can have no bearing on the resolution of the merits of *this* case. *See, e.g., United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 61 n.2 (1981) (holding that amici cannot raise an issue waived by the parties).